1986

# State of Utah v. Nicholas Louis Iacono : Brief of Respondent

Utah Supreme Court


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Kent O. Willis; Elkins and Willis; Attorneys for Defendant .

IN THE SUPREME COURT OF THE

STATE OF UTAH

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| STATE OF UTAH, | : | |
| Plaintiff/Respondent, | : | |
| vs. | : | Case No. 20434 |
| NICHOLAS LOUIS IACONO, | : | |
| Defendant/Appellant. | : | |

# BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF AGGRAVATED ROBBERY, A FIRST-DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-6-302 (1978), IN THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE CULLEN Y. CHRISTENSEN, PRESIDING.

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## STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Were defendant's black pants, obtained without a search warrant, erroneously admitted at trial where defendant failed to object to their admission, defendant lacked standing to object, and the results would not have been more favorable without the alleged error?

2. Was defense counsel ineffective in failing to object to admission of defendant's pants when such admission was either not erroneous or was harmless; or was counsel ineffective in failing to present testimony at trial that was not exculpatory?

3. Was the evidence sufficient to support the jury's verdict?

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## STATEMENT OF THE CASE

Defendant, Nicholas Louis Iacono, was charged with aggravated robbery, a first-degree felony, in violation of Utah Code Ann. § 76-6-302 (1978).

Defendant was convicted of aggravated robbery, in a jury trial held November 28, 1984, in the Fourth Judicial District Court, in and for Utah County, State of Utah, the Honorable Cullen Y. Christensen, presiding. Judge Christensen sentenced defendant on December 28, 1984, to five years to life at the Utah State Prison.

## STATEMENT OF FACTS

The following facts were derived from a stipulated fact statement appearing at pages 67-70 of the record.

The Colortyme Rental store in Orem was robbed by a single masked man between 5:30 and 5:40 p.m. on October 18, 1984 (R. 68). The robber wore black pants, a black jacket and tan gloves (R. 68). Over his head he wore a paper sack with holes

cut out for his eyes (R. 68). He was approximately 5'4" to 5'6" tall and carried a rifle with a white spacer around the stock (R. 68). The robber took $193.80 (R. 68).

The store clerk identified a paper sack found in a dumpster near defendant's apartment as the one worn by the robber (R. 68). She also said that a black jacket found inside defendant's apartment was similar to the one worn by the robber (R. 70). She said defendant was about the same height as the robber (R. 68). Another eyewitness who hid in the back room of the store said that a rifle found in the bushes outside of defendant's apartment was similar to the one used by the robber (R. 68).

Police officers retrieved a pair of black pants from defendant's mother's trailer without a warrant and they were introduced at trial (R. 70). Defendant's ex-wife Julie Iacono, admitted the officers, who had no warrant, to the trailer (R. 69, 70). Defendant did not object to the admission of these pants either before or during trial (R. 70).

Julie Iacono told inconsistent stories about defendant's activities at the time of the robbery. She said defendant wore black pants that night but that he was at her apartment with Rick Wright from 4:00 p.m. to approximately 6:30 p.m. that night (R. 69). She also told police that defendant and Wright were out looking for work during that time period (R. 69). She said she placed the rifle in the bushes outside the apartment at 10:00 p.m. on the night of the robbery (R. 69).

Rick Wright said defendant asked to borrow a rifle, mask and gloves on the day of the robbery and that he loaned defendant the rifle that was admitted at trial (R. 69). Defendant complained that day of having no money but later had around $180.00 when he appeared at Wright's home about 5:45 p.m. (R. 69). Wright said he and defendant talked about doing robberies between 10,000 and 250,000 times (R. 69). Defendant told Wright "armed robberies are a piece of cake" (R. 69).

Wright, Julie Iacono, and defendant testified that defendant wore black pants on the day of the robbery (R. 69, 70). Wright said defendant wore a black jacket but defendant said his black jacket was in his car that day (R. 69, 70). Defendant denied needing money, said he was with Wright and Julie Iacono from 4:00 to 6:30 p.m. and denied committing the robbery (R. 70).

Sherry Wright, Rick's wife, said defendant wore dark clothing the day of the robbery and that he and Rick left her home at 3:45 p.m. that day (R. 70). They returned around 7:00 p.m. (R. 70).

## SUMMARY OF ARGUMENT

Defendant waived any objection he might have had to admission of his pants into evidence by failing to object at trial. Defense counsel properly refrained from objecting to evidence when defendant lacked standing to object and was, therefore, effectively assisting defendant. Even if defense counsel could have objected to the evidence, failure to do so was not prejudicial where defendant testified that he wore black pants on the day of the robbery.

The evidence was not only sufficient but was overwhelmingly so even though circumstantial. Thus, the jury's verdict was supported by the evidence.

## ARGUMENT

### POINT I

### THE TRIAL COURT PROPERLY ADMITTED DEFENDANT'S BLACK PANTS INTO EVIDENCE.

On appeal defendant argues that a pair of black pants taken from his mother's trailer was not admissible because they were obtained without a search warrant or other justification for the search. He admits, however, that he did not object to admission of the pants. By failing to object to admission of the evidence, defendant waived this issue for appeal. State v. Steggell, 660 P.2d 252 (Utah 1983); State v. Heaps, 711 P.2d 257 (Utah 1985).

Even if defendant had preserved his objection to admission of the pants and even if the pants had been erroneously admitted, the error would have been harmless. Three persons, including defendant, testified that defendant wore black pants on the day of the robbery. Admission of defendant's black pants only illustrated that defendant did, in fact, own black pants. In face of the other strong evidence that defendant committed the robbery, admission of the black pants was harmless. State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984). (Court must find reasonable likelihood of more favorable result absent alleged error.)

Moreover, it appears defendant did not have standing to object to admission of the evidence from the facts recited in the

stipulated record. Nothing in the record indicates that defendant had any privacy interest in his mother's trailer. Lacking such an interest, defendant lacked standing to object to the warrantless search of the trailer and seizure of the black pants. c.f. State v. Valdez, 689 P.2d 1334 (Utah 1984).

POINT II

DEFENSE COUNSEL PROVIDED EFFECTIVE ASSISTANCE.

Defendant alleges two instances where his counsel was ineffective. First, he complains of counsel's failure to object to admission of his black pants, and second, complains of counsel's failure to call Christopher Sisneros as a witness. For support, defendant cites Codianna v. Morris, 660 P.2d 1101 (Utah 1983). Application of the standard enunciated in Codianna, however, demands a finding that counsel was effective.

In Codianna this Court said:

> (1) The burden of establishing inadequate representation is on the defendant, "and proof of such must be a demonstrable reality and not a speculative matter" . . .
>
> (2) A lawyer's "legitimate exercise of judgment" in the choice of trial strategy or tactics that did not produce the anticipated result does not constitute ineffective assistance of counsel . . . .
>
> (3) It must appear that any deficiency in the performance of counsel was prejudicial. . . . In this context, prejudice means that without counsel's error there was a "reasonable likelihood that there would have been a different result."

660 P.2d at 1109 (citations omitted). See also, Strickland v. Washington, 466 U.S. 668, 687, 694, 700 (1984). (Failure to show either deficient performance or sufficient prejudice defeats ineffectiveness claim.)

In this case, defendant's claim that counsel was ineffective by failing to object to admission of his black pants does not demonstrate prejudice. Defendant, himself, admitted he wore black pants that day. The robbery weapon and paper mask were connected to him. He previously talked about committing robberies and he suddenly acquired $180.00 after complaining that he had no money. In the face of this evidence, admission of the black pants was not prejudicial even if they should not have been admitted. There is little likelihood that the result of the trial would have been different absent admission of the pants. Further, it appears from the record that defendant lacked standing to object to admission of the evidence as argued above. If defendant lacked standing to object, counsel was not deficient in failing to object.

As for defendant's second claim; failure to call Christopher Sisneros, defendant cannot even demonstrate deficient performance, let alone prejudice. While the transcript of preliminary hearing is not a part of the record on appeal, defendant's version of Sisneros' testimony does not support his contention that counsel was deficient in not calling Sisneros at trial. Defendant alleges Sisneros admitted at preliminary hearing that he concocted a story for police officers that defendant had confessed to him.

This evidence would not, as defendant urges, have been exculpatory for defendant. It would merely have pointed out that a jail inmate had lied to police and invented a confession by defendant to promote his self-serving interests. Because the

evidence was not exculpatory, counsel was not deficient in refraining from its production. Clearly, defense counsel was effective in both regards.

POINT III

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE CONVICTION

Defendant's claim on this point is essentially that his alibi evidence should have outweighed the State's circumstantial evidence as a matter of law. (Appellant's brief at 9.) This claim is unsupported by any authority and, in fact, is refuted by the case law that defendant cites. Both State v. Mills, 530 P.2d 1272 (Utah 1975), and State in Interest of M.S., 584 P.2d 914 (Utah 1978), cited by defendant point out that the jury is the sole judge of the weight of the evidence presented. See also, State v. Howell, 649 P.2d 91, 97 (Utah 1982). With this in mind, taking the evidence in the light most favorable to the verdict, State v. Dumas, 37 Utah Adv. Rep. 5, 6 (June 30, 1986), it is clear that the evidence recited in the fact statement above was sufficient in this case.

CONCLUSION

The State requests this Court, based upon the arguments presented above, to affirm defendant's conviction.

DATED this 11th day of August, 1986.

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MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing brief to Kent O. Willis, attorney for appellant, 60 East 100 South, Suite 200, Provo, Utah 84601, postage prepaid, this 11th day of August, 1986.